the other circuits is what is the standard for meeting the third prong of the analysis, i.e., what type of record is sufficient to show a reasonable probability of a different result. *See id.*

The Eleventh Circuit has interpreted the third prong of the plain error test as requiring a defendant to show in absolute terms that the result would have been different. The Eleventh Circuit is looking for an affirmative statement in the record that the District Judge would go lower if only he could. As has been found by so many other courts, the Eleventh Circuit is wrong.

The defendant need only show a reasonable probability that the sentence, imposed by a Judge under an unconstitutional, mandatory, guidelines scheme, would be lower. Said another way, the Eleventh Circuit should be asking the question: is our confidence in the outcome undermined? The Sixth Circuit has found that where the District Judge has sentenced to the low end of the range and expressed sympathy for the defendant, that is sufficient to undermine confidence in the outcome. *See United States v. Hamm*, 400 F. 3d 336 (6th Cir. 2005).

The Eleventh Circuit, the Eighth Circuit and the Fifth Circuit have specifically found that a sentence at the lowest end of the then mandatory guideline range, without more, is not sufficient to raise a reasonable probability that the court may have imposed a lesser sentence under a non-mandatory guideline scheme. *See United States v. Fields*, 408 F. 3d 1356 (11th Cir. 2005); *United States v. Demarick*, No. 04-15136 (11th Cir. July 12, 2005); *United States v. Leisure*, 412 F. 3d 857 (8th Cir. 2005); *United States v. Ellefson*, No. 04-1293 (8th Cir. August 23, 2005); *United States v. Espinoza-Gamez*, No. 04-50415 (5th Cir.

June 3, 2005). Implicitly, the Eleventh Circuit's decision in the instant case of Wendy Lalan, also finds that the sentence at the lowest end of the guideline range, even with the significant evidence presented for a downward departure and expressions of sympathy from the District Judge, were insufficient to meet the third prong of the plain error test in the Eleventh Circuit.

This is directly at odds with other circuits which have expressly found that a sentence at the lowest end of the guideline range available under the then-mandatory scheme was sufficient to meet the third prong of the plain error analysis. *See United States v. Henry*, 408 F. 3d 930 (7th Cir. 2005); *United States v. Hamm*, 400 F. 3d 336 (6th Cir. 2005); *United States v. Rone*, No. 04-5682 (6th Cir. July 27, 2005).

Some of the Circuit Courts have adopted a presumed prejudice standard due to the radical sweeping change in the sentencing regime, noting the difficulty criminal defendants will have demonstrating that their sentence would have been different. *See United States v. Barnett*, 398 F. 3d 516 (6th Cir. 2005). The Second Circuit observed that it is "impossible to tell what considerations counsel for both sides might have brought to the sentencing judge's attention had they known that they could urge the judge to impose a non-Guidelines sentence." *United States v. Crosby*, 397 F. 3d 103 (2d Cir. 2005). The Third Circuit, in *United States v. Davis*, 407 F. 3d 162 (3rd Cir. 2005) ordered the remand of every case pending on direct review with a *Booker* sentencing issue in order to:

> [E]nsure that each defendant to whom *Booker* applies is sentenced accordingly. This approach results in uniform treatment of post-*Booker* defendants on direct appeal, fostering certainty in

> the administration of justice and efficient use of judicial resources. Moreover, as the Court of Appeals for the Second Circuit has noted, "correction of error in the context of sentencing does not precipitate . . . burdensome and often lengthy consequence[s]" on remand. [cite omitted]

Id. at 165-166. The Ninth Circuit, as well, advocates a limited remand to determine the issue of whether the sentencing court would have sentenced differently under a non-mandatory guideline scheme. *See United States v. Ameline*, 409 F. 3d 1073 (9th Cir. 2005). The Ninth Circuit noted the inherent unfairness of requiring the defendant to show that the District Judge would have imposed a different sentence when at the time there was no reason for the sentencing court to so indicate. *Id.* at 1080.

> To leave standing [a] sentence imposed under the mandatory guideline regime, we have no doubt, is to place in jeopardy the fairness, integrity, or public reputation of the judicial proceedings.

United States v. Hughes, 396 F. 3d 374 (4th Cir. 2005).

Rather than considering why it stands criticized for its rigid application of the plain error analysis, the Eleventh Circuit has simply turned this Court's decision in *Booker* into a lottery of sorts. If a defendant is fortunate enough to have a more talkative judge, there may be something in the record to meet the incredibly high standard of proof the Eleventh Circuit has set for the third prong of the analysis. However, a less chatty district judge who simply listens and imposes a sentence at the lowest end of the then mandatory guideline range will not have provided a defendant with the magic words required to obtain a new sentencing in the Eleventh Circuit. *See United States v. Antonakopoulos*, 399 F. 3d 68, 81 (1st Cir.

2005) ("The existence of prejudice should not turn on how vocal the district judge was.").

Concurring in *Ameline*, 408 F. 3d at 1105, Judge Gould noted:

> [I]t would be most unfair and unreasonable for us to ground our prejudice on the fortuity of whether a defendant was sentenced by a particular sentencing judge who openly criticized the Guidelines or indicated that they were unduly harsh as applied to a particular defendant rather than one who felt constrained to quietly follow the law. Our judicial system is predicated on judges following the law, and, so far as is humanly possible, keeping their personal opinions to themselves.

Similarly, defendants who have the misfortune of having the Eleventh Circuit review their *Booker* claims, are having their unconstitutional sentences reviewed under a different, higher, standard than other defendants around the nation.

Thus, the writ in this case should be granted for two significant reasons:

1. There is a distinct and obvious conflict between the circuits on the application of the plain error analysis to *Booker* cases which cannot be reconciled; and,

2. It is a miscarriage of justice to give a person an illegal sentence that increases his punishment, just as it is to convict an innocent person. *See United States v. Paladino*, 401 F. 3d 471, 483 (7th Cir. 2005).

CONCLUSION

The Eleventh Circuit has incorrectly applied the plain error analysis to the petitioner's claim under *Booker* to have her unconstitutional sentence vacated. The Eleventh Circuit's decision is in conflict with the other circuits and results in a miscarriage of justice. For the reasons stated above, this Court should grant Petitioner's writ of certiorari.

Respectfully submitted,

LEEZA R. CHERNIAK
Georgia Bar No. 123380
LAW OFFICES OF LEEZA R. CHERNIAK
1800 Peachtree Street
Suite 300
Atlanta, Georgia 30309
(404) 355-3031

Counsel for Petitioner

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11114

D. C. Docket No. 02-00155-CR-4-1

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

versus

SHIRAZ DHANANI,
AMZAD LALANI,
WENDY LALANI,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

(Filed April 12, 2005)

Before BARKETT, KRAVITCH and FARRIS*, Circuit Judges.

BARKETT, Circuit Judge:

Shiraz Dhanani, Amzad Lalani, and Wendy Lalani appeal their convictions and sentences for transporting in

---

* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

interstate commerce stolen goods of at least $5,000 in value, as well as conspiracy to do so, in violation of 18 U.S.C. §§ 371 and 2314. All three were convicted after a jury trial on September 17, 2003. On February 18, 2004, the district court sentenced Dhanani and Wendy Lalani to 63 months' imprisonment each, and sentenced Amzad Lalani to 121 months' imprisonment.

We have carefully considered the record as it relates to all three appellants and are satisfied that there is sufficient evidence to support the jury's verdict. *See United States v. Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999) ("A conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable construction of the evidence."). We also find no merit in any of the appellants' other challenges to their convictions.

We likewise find no error in the sentences imposed by the district court. In particular, any error under *United States v. Booker*, __ U.S. ___, 125 S.Ct. 738 (2005), fails the third prong of plain error review as interpreted by *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005).

AFFIRMED.

United States Court Of Appeals
For the Eleventh Circuit

No. 04-11114

District Court Docket No.
02-00155-CR-4-1

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

versus

SHIRAZ DHANANI,
AMZAD LALANI,
WENDY LALANI,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

JUDGMENT

(Filed Apr. 12, 2005)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: April 12, 2005
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

ISSUED AS MANDATE

JUL 07 2005

U.S. COURT OF APPEALS
ATLANTA, GA.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11114-II

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

versus

SHIRAZ DHANANI,
AMZAD LALANI,
WENDY LALANI,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

(Filed Jun. 8, 2005)

Before: BARKETT, KRAVITCH and FARRIS*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

---

* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rose Barkett
UNITED STATES CIRCUIT JUDGE